IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

Cr. Appeal No.36 of 1993.
Judgment reserved on: October 25,2007.
Date of decision: October 31st, 2007.

State of Himachal Pradesh. …. Appellant.

Vs.

Kanwar Ram Kirpal. …. Respondent.

Coram

The Hon'ble Mr.Justice Surjit Singh, Judge.

The Hon'ble Mr.Justice Surinder Singh, Judge.

Whether approved for reporting? Yes.

For the Appellant: Mr.S.D. Vasudeva, Additional Advocate General with Mr.D.S. Nainta, Deputy Advocate General.

For the Respondents: Mr. Subhash Sharma, Advocate.

Surinder Singh, J:

The respondent was tried and acquitted of the offence, charged under Section 376 of the Indian Penal Code.

The State felt aggrieved by the impugned judgment of acquittal and filed the present appeal.

We have heard and gone through the record of the case.

In brief, the prosecution case can be summed up thus: The prosecutrix (16 years) was involved in a case of theft and was lodged in Children Home, Una, where Smt. Bala Rani, the wife of the respondent was working as an attendant. Prosecutrix belonged to Kinnaur District of Himachal Pradesh. Bala Rani, aforesaid procured the bail of the prosecutrix on 20.12.1990 and kept her in her house, where she stayed upto 16.1.1991. Suddenly, the prosecutrix disappeared from the house of Bala Rani. On

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Whether reporters of local Papers may be allowed to see the judgment? Yes.

28.1.1991, she was traced by the respondent from bus-stand Shimla and was handed over to police in Police Station Boileauganj. She was released by the police on 29.1.1991. Since, Bala Rani, was surety of the prosecutrix, therefore, she alongwith her husband-respondent, made a hunt for her. Ultimately, she was found in Middle Bazar, Shimla on 27.3.1991 and was brought to Una on 31.3.1991 and produced before the Children Court on 1.4.1991. The said Court sent her to the Children Home again.

On 3.4.1991, the prosecutrix was medically examined. She was found to be pregnant. On enquiry by Smt. Kanta Devi (PW5), the Superintendent of Children Home, the prosecutrix alleged rape during her stay w.e.f. 20.12.1990 to 16.1.1991 in the house of Bala Rani, by her husband (respondent) on 10.1.1991 and 11.1.1991.

On 4.4.1991, the prosecutrix filed a complaint Ext.PC, to the Presiding Officer (PW4) Children Court, Una, which was forwarded to Station House Officer, Police Station, Una, for investigation. On the basis of it, a case under Section 376 of the Indian Penal Code was registered.

On 6.4.1991, Dr. Ritu Jaswal (PW1) medically examined the prosecutrix and found carrying $2^{1/2}$ months pregnancy. The uterus was 10 weeks size. She issued the Medico Legal Certificate Ext.PA. The respondent was also medically examined by Dr. P.K. Thakur. He had already undergone a vasectomy operation in the year 1984, but was found fit to perform the sexual intercourse. His MLR is Ext.PB.

On 27.4.1991, the prosecutrix complained pain in her stomach. She was admitted in the hospital with bleeding and incomplete abortion. Dr. Mrs. S. Chauhan (PW2) seeing her condition, decided for dilation and curettage for termination of pregnancy. Thus, D.N.C. was done to save her life.

On completing the investigation, the challan was put up in the court for trial, under the aforesaid section, against the respondent. He was charge-sheeted, but he pleaded not guilty and claimed trial.

To prove its case, the prosecution examined its witnesses. The respondent was also examined under Section 313 of the Code of Criminal Procedure. His defence was that his wife Bala Rani got the prosecutrix released on bail, on the advise of the Presiding Magistrate, Children Home. She may not jump bail, therefore, the prosecutrix was brought by his wife to her home. She was not left alone but was kept by Bala Rani his wife under her surveillance. Naresh Kumari (DW) who was brought up by the respondent and was kept as maid-servant was also got married to Ramesh Chand by the respondent. On 3.1.1991 Naresh Kumari, alongwith her husband visited them and stayed in their house till 14.1.1991. The respondent had been staying in Jungle Kuthar, which he had taken on lease, w.e.f. 7.1.1991 to 12.1.1991. He visited his house on 13.1.1991 to celebrate Lohari and went back to the Jungle. On 14.1.1991, leaving behind the prosecutrix in the house his wife Bala Rani went to bus-stand to see off Naresh Kumari and her husband, the prosecutrix fled away. In the evening, he was informed of missing the prosecutrix. He reported the matter in Police Station, Una and searched for her at various places. He went to her native place, Kinnaur, where he came to know that she had gone to Dhalli. On 28.1.1991, on his way back, the prosecutrix met him, by chance, at Lakkar Baxar Bus stand. He made an option to her either to accompany him or to go to the police station. She consented to accompany him after visiting her cousin at Dhalli. Both of them went to Dhalli, but her cousin was not available. The prosecutrix showed her reluctance to accompany the respondent,

thus on the pretext to take her to some relatives, she brought her to the `Reporting Room' Shimla. Police took her to Police Station, Boileauganj. A report was entered there at her instance, its copy was also given to him. The police asked the respondent to bring the report from Una Police station. The prosecutrix was sent with a lady Constable. Thereafter, the prosecutrix was not made available to him. In March, 1991, he alongwith his wife Bala Rani pursuant to the non-bailable warrants issued by the Children Court, searched for her. When they reached Shimla and were about to catch the bus to Kinnaur, they came to know that the prosecutrix was in the town. They approached the Superintendent of Police, Shimla and got arrested the prosecutrix from Lower Bazar. The prosecutrix was brought to Una and she was produced before the court on 1.4.1991. Further, he has explained that neither he had committed any rape nor he was responsible for impregnating her. In fact, he had undergone the sterilization operation in the year 1984. According to him, it was a false case. On account of the fact that the prosecutrix was handed over back to the Court, she had threatened him to implicate him for her pregnancy.

The trial Court called upon the respondent, to enter into his defence. He examined Dr. J.S. Banyal (DW1) who confirmed the fact of sterilization of the respondent having been done by him on 31.10.1984. Manjeet Singh, Constable has proved Ext.DW3/A and Ext.DW3/B Rapat Roznamcha dated 28th/29th January, 1991 and Rapat No.5 of 29.1.1991 respectively, regarding her missing from the house of the respondent. DW4 H.C. Shanker Singh of Police Station, Sadar Shimla has proved Rapat No.18 dated 30.3.1991 (Ext.DW4/A) to the effect that the prosecutrix was sent with the respondent and his wife, to produce her in Una, Court, to facilitate Bala Rani his wife, to get her bail cancelled. District Welfare Officer

(DW5) produced Ext.DW5/A. Bala Rani (DW6) has corroborated the case of her husband-respondent. The accused also examined Naresh Kumari, aforesaid (DW7) to lend strength to his case.

The learned trial court heard both the counsel and sifted the evidence of both the parties and came to the conclusion that the statement of the prosecutrix did not inspire confidence, coupled with the other circumstances detailed in his judgment.

The learned Additional Advocate General has argued that the findings of the learned trial court are incorrect and there are grounds to convert the judgment of acquittal into conviction.

We have given our thoughtful consideration to his contention, with a view to find out the truth, we proceed to reappraise the statement of the prosecutrix whether it inspires confidence to sustain the conviction of the respondent?

PW8, the prosecutrix has admitted having been lodged in Children Home, Una, because of a theft case against her. It is also admitted by her that she was got released on bail by Bala Rani (DW) and thereafter she resided in the house of the respondent. According to her respondent committed rape on her on 10.1.1991 and 11.1.1991 during the day time when Bala Rani, his wife was out on her duty. She left their house on 16.1.1991. According to her, the respondent met her on 28.1.1991, at bus-stand Lakker Bazar and took her to police station on the pretext of taking to the house of her cousin-brother Suresh Kumar, who was residing at Boileauganj. She is alleged to have narrated the entire story to the police. She stayed for the night with a lady constable and was released next day without taking any action. Thereafter, she went to Kinnaur. On the third day she came to Dhalli, to the house of her Bua (aunt). She stayed there for two months. On 27.3.1991, she was arrested by the police from Middle Bazar Shimla. The

respondent and his wife Bala Rani brought her to Una. On 4.4.1991, she made a complaint Ext.PA to the Presiding Magistrate.

In her cross-examination, she has stated that her marriage was solemnized in March,1991. It is admitted by her that when she was arrested in a theft case on 4.11.1990, she remained in the Children Home, from where she had run away in the month of November, 1990, itself, but was brought back. She stayed in the house of respondent w.e.f 20.12.1990 to 16.1.1991. She denied that w.e.f. 3.1.1991 to 14.1.1991, Naresh Kumari(DW) had also resided there with her husband. She further stated that she did not tell Bala Rani or to anybody else about the incident as she was threatened by the respondent to her life. But she had told this fact to a lady residing nearby the house of the respondent, whose name she did not know. She has denied having run away after committing the theft of ornaments and clothes etc. in the house of the respondent. She has further stated that she reached Reckong-Peo, in the house of her Bua on 18.1.1991 and narrated the incident to her. She stayed there for 7 days. She tried to get her FIR registered but was unsuccessful for want to jurisdiction. She came to Shimla on 21.1.1991 and stayed at Dhalli with her Bua and also narrated about the incident to her but no report was lodged. Further stated that she was produced before the Children Court on 3.4.1991 and not on 1.4.1991 and made the complaint on 4.4.1991. She has also admitted to have been taken to medical examination to Dispensary at Una, but she did not remember the date. She denied the suggestion that as her bail bonds were got cancelled, she foisted a false case upon the respondent.

According to Doctor Mrs. Ritu Jaswal (PW1) the prosecutrix revealed to have last menstruated on 5.1.1991. About three months

back she had amenorrhea (an abnormal absence of menstruation). On her examination, she was found to have carried a pregnancy of about 2½ months, which could even be of two months, the uterus was not pulpable. The said Doctor had examined her on 6.4.1991. As stated above, the prosecutrix had stated to also married in the month of March, 1991, which was not disclosed to the doctor at the time of her medical examination.

On the close scrutiny of the evidence of the prosecutrix, we have noticed many regrettable features of the case, which makes her version quite doubtful. Few of them are:-

(i) According to the prosecutrix, on reaching Reckong-Peo, in the house of her Bua, she had narrated the entire story to her on 18.1.1991 and contacted the police on 20.1.1991, but neither her Bua nor any police officer from Reckong-Peo was enquired by the police nor examined. This fact was also not disclosed by her in her complaint Ext.PC.

(ii) On 22.1.1991, she came to Dhalli to the house of her another Bua and is alleged to have revealed about the above incident. Again neither her said Bua was examined nor it was disclosed by her in her complaint Ext.PC.

(iii) On 28.1.1991, she was apprehended at Bus-stand, Shimla and taken to the reporting room, then to police station, Boileauganj where she is alleged to have narrated about the incident, is not born out from the Rapat No.18 (Ex.DW4/A) supra. According to PW9 ASI Jagdish Chand it did not come in his investigation that the prosecutrix had revealed about the alleged incident either in Police Control Room or in Police Station, Boileauganj.

(iv) Had she informed the police about the rape by the respondent against her, she could not have been released without any medication examination or any action against the respondent.

(v) On 28.3.1991, the prosecutrix was arrested in middle bazaar, Shimla, pursuant to non-bailable warrant and brought to Una, where she was

produced before the Presiding Magistrate on 1.4.1991, as stated by PW5 Kanta Devi, again she did not make any allegation against the respondent, even she did not disclose about the rape to the Superintendent, Children Home.

(vi) She was medically examined on 3.4.1991 when found to be pregnant, on enquiry by PW5 aforesaid, she is alleged to have implicated the respondent holding him responsible for the pregnancy. Thus made the complaint Ext.PC on 4.4.1991. As already observed above the respondent had undergone the vasectomy operation in the year 1984.

(vii) With respect to the rape on 10.1.1991 and 11.1.1991, she did not make any complaint to the wife of the respondent nor it is proved to have been made to any other person, as alleged. Then suddenly, she implicated the accused on 4.4.1991 though itself it is quite surprising, yet the reason is obvious. The respondent had chased her to bring her back to the custody of the court because he had escaped from his house and his wife was the surety. He got her arrested, thus seeing herself in a difficult situation with a fear of trial and again sending to the Children Home, from where she had once attempted to escape earlier, she might have imputed the allegation out of vengeance.

(viii) From Dr. Mrs. S. Chauhan (PW2) who had done D.N.C. of the prosecutrix on 27.4.1991, the prosecution could have explored the age of the embargo, in order to ascertain the time of conception as the prosecutrix at that time was already married. There is no conclusive proof of the age of foetus. In absence of it, the benefit has to go to the accused.

(ix) As has been seen from the above evidence, on record, the prosecutrix was under nobody's control, she was wandering from one place to another without the protection of her parents or even an elderly person of the family. She appeared to be a free lancer. She is also stated to have been putting up with ITI students, namely Bhag Dev, Roop Lal and Prem Chand in Summerhill, Shimla as per

> Rapat Roznamcha (Ext.DW3/A) dated 28.1.1991. Therefore, in these circumstances, her testimony becomes quite doubtful.

Legally, the evidence of the prosecutrix is enough to sustain the conviction of the accused, if it inspires confidence.

We are aware that the testimony of a victim in a rape case is vital. Unless there are compelling reasons which necessitate looking for corroboration of her statement, there should not be any difficulty to act on the testimony of a victim to convict the accused, if reliable. As a rule, seeking corroboration of her statement would be hazardous. But, however, the court may look for some assurance, while appreciating his testimony, which appreciating the evidence.

In the instant case, the prosecutrix herself has made her version quite doubtful by her own act and conduct. On the top of it her silence for about four months despite having opportunity to lodge the report has further compounded the doubt, on her version. The plea that she had reported to police at Reckong-Peo and Dhalli, is not proved to be a correct version. On the top of it, non--disclosure of the fact of complaining to her Bua during investigation of the case makes her case a suspect. There is an equi -balanced defence version, which has been proved by preponderance of probabilities.

Therefore, in our considered view for the reasons aforesaid, on the re-examination of the evidence on record, the case of conviction for the offence charged, against the respondent is not proved beyond a reasonable doubt. We find no ground to interfere with the findings of acquittal recorded by the trial court, as these are born out from the record. Accordingly, the acquittal of the respondent is upheld and the appeal is dismissed.

The respondent is discharged of his bail bonds entered upon by him, at any time during the proceedings of this case.

(Surjit Singh)
Judge.

October 31st, 2007. **(Surinder Singh)**
(PDS) **Judge.**